

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

On February 23, 2009, the City of Emeryville Redevelopment Agency ("defendant") filed a motion to dismiss plaintiff Andre Carpiaux's ("plaintiff") complaint for failure to state a claim upon which relief may be granted, or, in the alternative, a motion for more definite statement pursuant to Fed. R. Civ. Proc. 12(b)(6) and 12(e), respectively.<sup>1</sup> After a series of continuances (see, e.g., Doc. No. 27), plaintiff filed an opposition to defendant's motion to dismiss on July 7, 2009, and defendant thereafter filed a reply to plaintiff's opposition on July 13. Plaintiff

<sup>1</sup> All parties have consented to my jurisdiction, for all proceedings including entry of final judgment, pursuant to 28 U.S.C. § 636(c).

1 subsequently filed a request for a continuance on July 17,  
2 which the Court granted. (See Doc. No. 36.) In the Court's  
3 order granting plaintiff's request for a continuance, the  
4 Court noted that plaintiff's opposition to defendant's motion  
5 read more like an amended complaint than an opposition. The  
6 Court therefore treated plaintiff's opposition as an amended  
7 complaint, and set a further briefing schedule, which required  
8 plaintiff to file an opposition to any further papers filed by  
9 defendant no later than September 8, 2009. The Court received  
10 defendant's supplemental papers, but has not received  
11 plaintiff's opposition nor any request from plaintiff for a  
12 further continuance. Despite plaintiff's failure to file  
13 additional papers, the Court reviewed the motion, and for the  
14 following reasons **GRANTS IN PART** and **DENIES IN PART**  
15 defendant's motion to dismiss.

16 Plaintiff's complaint alleges violations of the Brown  
17 Act, Cal. Gov. Code §§ 54950-63, the Americans with  
18 Disabilities Act ("ADA"), 42 U.S.C. § 12101, and a variety of  
19 other state law tort claims, including civil conspiracy. With  
20 regard to the Brown Act and the ADA, plaintiff alleges that  
21 defendant failed to provide proper notice of community  
22 meetings and that upon attending the meetings, plaintiff was  
23 unable to participate because defendant did not provide  
24 appropriate auxiliary devices for hearing impaired  
25 individuals.<sup>2</sup>

2 I note as an initial matter that to the extent that  
27 plaintiff's complaint attempts to assert claims under the Brown  
28 Act or the ADA on behalf of other individuals, those claims are  
**DISMISSED**, as plaintiff lacks standing to sue on behalf of

1 A motion to dismiss under Rule 12(b)(6) tests for legal  
 2 sufficiency of the claims alleged in the complaint. While a  
 3 complaint attacked by a Rule 12(b)(6) motion to dismiss does  
 4 not require "detailed factual allegations," a pleading that  
 5 offers "labels and conclusions" or "a formulaic recitation of  
 6 the elements of a cause of action will not do." Ashcroft v.  
 7 Iqbal, --- U.S. ---, 129 S.Ct. 1937 (2009) (quoting Bell  
 8 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). For  
 9 purposes of such a motion, the complaint is construed in a  
 10 light most favorable to the plaintiff and all properly pleaded  
 11 factual allegations are taken as true. Jenkins v. McKeithen,  
 12 395 U.S. 411, 421 (1969); Everest & Jennings, Inc. v. Am.  
 13 Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994).  
 14 Furthermore, courts are particularly liberal in construing  
 15 "inartful pleadings" by *pro se* litigants. Erickson v. Pardus,  
 16 551 U.S. 89 (2007); Estelle v. Gamble, 429 U.S. 97, 106  
 17 (1976).

18 Defendant moves to dismiss plaintiff's first cause of  
 19 action, entitled "[p]roper service", arguing that plaintiff's  
 20 complaint fails to allege sufficient facts to support a claim  
 21 for relief. (Def's Mot. to Dismiss p. 7.) While the  
 22 complaint does not specify whether this cause of action is  
 23 based on federal or state law, fairly read, it appears to be  
 24

---

25 third parties. For a plaintiff to have standing to sue, a  
 26 plaintiff must show (1) injury in fact; (2) a causal connection  
 27 between the injury and the defendant's conduct; and (3) it is  
 28 likely that the injury will be redressed by a favorable  
 decision. Lujan v Defenders of Wildlife, 504 U.S. 555, 560-61  
 (1992). Plaintiff fails to plead the first element, injury in  
 fact, and therefore does not have standing to sue.

1 based on the Brown Act, which requires that public hearings be  
2 properly noticed. See Cal. Gov. Code § 54954.2. The Brown  
3 Act requires, in relevant part, that the agenda of a regular  
4 meeting ". . . be posted in a location that is freely  
5 accessible to members of the public." Cal. Gov. Code §  
6 54954.2. The Brown Act also states that a person may request  
7 an agenda upon written notice to the relevant agency or  
8 designee. Id. Plaintiff's complaint alleges that plaintiff  
9 "deserves more than a mere perfunctory announcement such as  
10 posted at local fire station . . . ." (Compl. p. 2.) This  
11 allegation effectively concedes compliance with the Brown Act,  
12 as the allegation insinuates that notice of the meeting was  
13 posted at a fire station, which is freely accessible to the  
14 public. Plaintiff's complaint does not allege that he  
15 requested an agenda from defendant or that his request was  
16 ignored or denied. Therefore, plaintiff's first cause of  
17 action for improper service under the Brown Act is **DISMISSED**.

18 Defendant next moves to dismiss plaintiff's second cause  
19 of action, entitled "[f]ailure to provide adequate hearing  
20 devices," arguing that plaintiff's complaint fails to allege  
21 adequate facts to support a claim for relief under either the  
22 Brown Act or the ADA. The Court reviews the sufficiency of  
23 plaintiff's complaint under both Acts.

24 The Brown Act requires that upon posting a notice of a  
25 regularly scheduled meeting, the posted notice include  
26 information directing individuals with disabilities on how to  
27 request a modification or accommodation so that the disabled  
28 individual may participate in the public meeting. Cal. Gov.

1 Code § 54954.2(a)(1) ("The agenda shall include information  
2 regarding how, to whom, and when a request for disability  
3 related modification or accommodation, including auxiliary  
4 aids or services may be made by a person with a disability who  
5 requires a modification or accommodation in order to  
6 participate in the public meeting."). While the Brown Act  
7 requires that accommodations be made for disabled individuals,  
8 including those who suffer from hearing impairments, it also  
9 requires that the disabled attendee provide advance notice of  
10 what accommodations are needed. Id.

11 Here, plaintiff alleges that he attended a meeting at a  
12 local fire station<sup>3</sup> and that upon his arrival, he requested  
13 the assistance of an auxiliary hearing device. (Compl. p. 2.)  
14 Plaintiff's complaint does not allege that plaintiff requested  
15 an accommodation from defendant before the meeting, or that  
16 the posted notice of the meeting failed to provide the  
17 requisite information on who to contact to request such an  
18 accommodation in advance of the meeting. Accordingly,  
19 plaintiff's second cause of action fails to state a claim for  
20 relief under the Brown Act.

21 Defendant also argues that plaintiff's second cause of  
22 action fails to state a claim for relief under the ADA, which  
23 requires that a public entity provide auxiliary aids to the  
24 hearing-impaired when "necessary" for the individual's  
25

---

26 <sup>3</sup> Plaintiff does not allege the specific dates of the  
27 meetings he attended. Construing the complaint liberally, and  
28 making all reasonable inferences in favor of plaintiff, I  
assume for the purpose of this motion that the meeting(s) that  
plaintiff attended were in fact meetings held by defendant.

1 participation. See 28 C.F.R. § 35.160(b)(1). To determine  
2 what auxiliary aids are necessary, "a public entity shall give  
3 primary consideration to the requests of the individual with  
4 disabilities." 28 C.F.R. § 35.160(b)(2).

5 Reading the complaint in its entirety, plaintiff pleads  
6 sufficient facts to state a claim for relief under the ADA.  
7 Plaintiff claims that since he lost his hearing he "has asked  
8 repeatedly [for] the City to provide accommodation(s) to  
9 comply with the A.D.A. . . . ." (Compl. p. 4.) Plaintiff  
10 alleges that because he was not provided adequate auxiliary  
11 devices, he was unable to participate at defendant's regularly  
12 scheduled meetings. Accordingly, defendant's motion to  
13 dismiss plaintiff's second cause of action is **DENIED**.

14 Defendant next moves to dismiss plaintiff's third cause  
15 of action, entitled "[a]bsence of notice and its content."  
16 It is not clear from plaintiff's complaint whether  
17 plaintiff's third cause of action arises under the Brown Act  
18 or the ADA, but under either Act, plaintiff's complaint is  
19 insufficient. Plaintiff's complaint alleges that plaintiff  
20 did not receive personal notice of a meeting held by  
21 defendant and that there were no hearing assisted devices at  
22 the meeting, which prohibited plaintiff from full  
23 participation in the meeting. (Compl. p. 3.)

24 For the same reasons that plaintiff's first cause of  
25 action fails, plaintiff's third cause of action also must  
26 fail. In his complaint, plaintiff does not allege that  
27 defendant failed to publicly post a notice of either meeting,  
28 or that he requested personal notice from defendant and his

1 request was ignored or denied. Therefore, plaintiff fails to  
2 plead the necessary elements of a Brown Act violation.  
3 Likewise, the ADA requires a public entity to take reasonable  
4 measures to provide accommodation to individuals when  
5 necessary for their equal participation. 26 C.F.R. §  
6 35.160(b)(1). Here, plaintiff does not allege that he  
7 requested accommodation from defendant before or during the  
8 meetings, only that he noticed that there were no devices  
9 readily available to him. Even construing the facts  
10 liberally, plaintiff's complaint fails to plead adequate  
11 facts to allege a violation of either the ADA or the Brown  
12 Act. Accordingly, defendant's motion to dismiss plaintiff's  
13 third cause of action is **GRANTED**.

14 Defendant also moves to dismiss plaintiff's fourth cause  
15 of action, entitled "[c]ivil conspiracy," arguing that  
16 plaintiff fails to allege that defendant conspired with any  
17 other person or entity, an essential element of conspiracy  
18 under California law. (Def's Mot. to Dismiss p. 10.) A  
19 claim of conspiracy under California law requires the  
20 involvement of two or more persons or entities. Black v.  
21 Bank of America, 30 Cal. App. 4th 1, 6 (1994). Plaintiff's  
22 complaint alleges that defendant willfully violated the  
23 requirements of the Brown Act and the ADA in an attempt to  
24 limit his participation in local legislative meetings, but  
25 the complaint does not allege that defendant conspired with  
26 any other individual or entity. Accordingly, defendant's  
27 motion to dismiss plaintiff's fourth cause of actions is  
28 **GRANTED**.

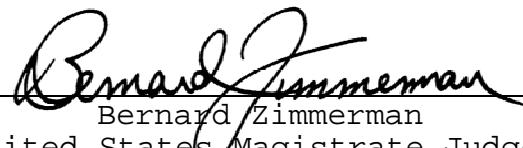
1           Defendant next moves to dismiss plaintiff's fifth,  
 2 sixth, and seventh causes of action, entitled "[d]efendant's  
 3 deceptive redundant strategy," "[a]buse of Judicial power,"  
 4 and "[e]xcessive abuse of (sovereign) IMMUNITY." Defendant  
 5 argues that plaintiff fails to plead cognizable legal  
 6 theories that would allow them to respond. Even construing  
 7 the facts liberally in plaintiff's favor, the Court is unable  
 8 to determine whether plaintiff states claims based on  
 9 cognizable legal theories. "To survive a motion to dismiss,  
 10 a complaint must contain sufficient factual matter, accepted  
 11 as true, to 'state a claim to relief that is plausible on its  
 12 face.'" Iqbal, 129 S.Ct. 1937, 1949 (citing Twombly, 550 U.S.  
 13 at 570). A claim has facial plausibility when the plaintiff  
 14 pleads factual content that allows the court to draw the  
 15 reasonable inference that the defendant is liable for the  
 16 misconduct alleged. Id. Given that plaintiff has had  
 17 previous opportunities to amend his complaint and has been  
 18 unable to plead sufficient facts to allow the Court to draw a  
 19 reasonable inference that defendant is liable for the alleged  
 20 misconduct, plaintiff's fifth, sixth, and seventh causes of  
 21 action are **DISMISSED**.

22           For the foregoing reasons, plaintiff's complaint is  
 23 **DISMISSED** as to all but the second cause of action.  
 24 Defendant's answer is due **October 15, 2009**.

25           This case is referred to a magistrate judge to conduct a  
 26 settlement conference in the next **60-90 days**, if possible.  
 27 Plaintiff, who has been found to be indigent, appears to be  
 28 in need of counsel and good and just cause appearing, **IT IS**

1 **HEREBY ORDERED THAT** plaintiff is referred to the Federal Pro  
2 Bono Project to seek a lawyer for him for the limited purpose  
3 of assisting him at the settlement conference. Upon being  
4 notified by the Project that an attorney has been located to  
5 represent plaintiff, and that plaintiff wants counsel, that  
6 attorney shall be appointed for the limited scope of  
7 representing plaintiff at the upcoming settlement conference.

8 Dated: September 22, 2009

9   
10 Bernard Zimmerman  
11 United States Magistrate Judge

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23 G:\BZALL\-\BZCASES\CARPIAUX C. CITY OF EMERYVILLE\ORDER GRANTING D'S MOT TO  
DISMISS1.wpd

24  
25  
26  
27  
28